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# Don't Ask, Don't Tell: HIPAA's Effect on Informal Discovery in Products Liability and Personal Injury Cases

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## Don't Ask, Don't Tell: HIPAA's Effect on Informal Discovery in Products Liability and Personal Injury Cases

### I. INTRODUCTION

With the passage of the Health Insurance Portability and Accountability Act of 1996 (HIPAA),<sup>1</sup> personally identifiable health information was subjected to a regulatory scheme that was stricter in most jurisdictions than previous regulations. To the average person, this was manifest through an increase in the number of signatures requested by physicians and pharmacists. Practicing attorneys, however, soon came to realize that this legislation affected much more than their time at the doctor's office. HIPAA displays an inherent disdain for informal discovery, a disdain that has led some attorneys to complain that HIPAA's restrictions prevent them from adequately serving their clients.<sup>2</sup> In particular, the privacy rules promulgated by the U.S. Department of Health and Human Services (DHHS) under HIPAA directly affect the way in which litigators pursue informal discovery, such as ex parte interviews (i.e. interviews conducted without notice to the adverse party).<sup>3</sup> This Comment discusses not only the effects of HIPAA that have already been discussed by the courts, but also delves into unresolved questions regarding informal discovery. Until questions about the extent of HIPAA's applications are answered, attorneys and investigators will continue to be forced onto unsteady ground in their efforts to provide their clients with high-quality representation.

This Comment argues that while the courts have recognized and accepted HIPAA's disdain for informal discovery (particularly in the form of ex parte interviews between physicians and attorneys), this disdain should not extend to ex parte communications between

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1. Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

2. See Jerry Potter, *Can We Talk? The Recent Givens Decision Says No*, 38 TENN. B.J. 15, 20 (2002); Bobby Russ, *Can We Talk? The Rest of the Story or Why Defense Attorneys Should Not Talk to the Plaintiff's Doctors*, 39 TENN. B.J. 29, 29 (2003).

3. See HIPAA Privacy Rule, 45 C.F.R. § 164 (2006).

emergency response personnel and attorneys. In many jurisdictions, HIPAA has been interpreted to limit contact with a plaintiff's physician to formal discovery through depositions and interrogatories. In some jurisdictions, ex parte interviews are never allowed. This stance is understandable considering the premium placed on personal health information and the policy considerations that support protection of the physician-patient privilege. But the rules and definitions of HIPAA have, perhaps unintentionally, extended this restriction against ex parte interviews to emergency response personnel. In the past, common practice in products liability or personal injury litigation has been for the attorney to conduct informal interviews with fact witnesses, such as EMTs, in an effort to obtain as much information as possible during the early stages of litigation. A cautious and perceptive attorney, or an attorney threatened with HIPAA sanctions by opposing counsel, would note that technically, HIPAA proscribes such interviews with EMTs and paramedics. This Comment argues that such a proscription is unnecessary, and should be eliminated.

The application of HIPAA's regulatory scheme to EMTs and paramedics can be problematic for an attorney, especially one who is used to conducting ex parte interviews according to common practice.<sup>4</sup> Nevertheless, should the courts strictly adhere to HIPAA's language, it is both likely and unfortunate that emergency response personnel would be subject to the same restrictions as a plaintiff's physician, thus eliminating useful tools for early discovery in products liability and personal injury litigation. But strong policy reasons support excluding EMTs and paramedics from HIPAA's restrictions.

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4. For indications of the common opinion among attorneys that fact witnesses should be personally interviewed as soon as possible, see, e.g., Jacob Williams Law Firm, PLLC, Personal Injury, [http://jacobwilliamsllaw.com/indexpage\\_7/PracticeArea.shtml](http://jacobwilliamsllaw.com/indexpage_7/PracticeArea.shtml) (last visited Sept. 13, 2006) ("[S]omeone should interview all witnesses and record their comments. Such interviews should be completed as soon as possible as witnesses' memories tend to fade with time."); LawInfo.com, Auto/Truck Accidents Attorneys, <http://www.lawinfo.com/index.cfm/fuseaction/Client.lawarea/categoryid/1177> (last visited Sept. 13, 2006) ("Interview all witnesses and record their comments either at the scene of the accident or as soon as possible afterwards. It is important to do these interviews as quickly as possible because witnesses' memories tend to fade with time and the information you get may not be as valuable to you. Information gathered immediately or very soon after the accident will be much more accurate than any recalled at some later date.").

The physician-patient privilege, which supplies much of the incentive for the privacy of personal medical information, does not exist in an emergency responder context.<sup>5</sup> As a result, the policy implications of the physician-patient privilege are weakened in an emergency response context. EMTs and paramedics do not usually have a continuing relationship with patients, nor are they particularly sought out or chosen by patients. And most importantly, there is no historical legal basis for applying the physician-patient privilege to EMTs or paramedics.

EMTs and paramedics are also less likely to disclose confidential personal information. Generally, the purpose behind informal interviews with emergency response personnel early on in litigation is to assess the facts behind an incident and to discover the types of injuries that may have occurred. The facts surrounding an accident do not constitute personal medical information, and the injuries incurred during an accident are not protected in litigation because they represent a basis for a plaintiff's claim for relief.

Finally, emergency response personnel are involved in numerous incidents each day, and tend to forget details that a defense attorney may find important, especially in the context of deposition testimony given months or years after an incident. The motivation for a quick informal interview with an emergency responder is to glean essential facts that might be forgotten prior to a deposition or that might not be considered important enough by the responder to be included in the usual reports and paperwork. Such information can be invaluable to an attorney.

This Comment begins with a discussion of informal discovery and the HIPAA regulations that affect informal discovery in products liability and personal injury cases. Part III then discusses recent cases in which the courts, at both the federal and state levels, have interpreted HIPAA regulations in relation to discovery issues in civil actions, particularly *ex parte* interviews with a plaintiff's physician. Part IV goes one step beyond these court decisions and discusses how HIPAA's regulations apply not only to physicians but also to EMTs and paramedics. Part IV also analyzes the policy issues that will inevitably arise when this question comes before the courts. Part V offers a brief conclusion.

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5. See 98 C.J.S. *Witnesses* § 349 & n.6 (2006).

## II. HIPAA

The Health Insurance Portability and Accountability Act of 1996 was passed to

improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.<sup>6</sup>

When it comes to litigation, however, the parts of the Act that are of greatest importance are the privacy rules created to restrict the use and disclosure of an individual's personal health information.<sup>7</sup> These rules and procedures limit and control the way an attorney (or anyone else) can discover the health-related information of another individual. Thus, litigators need to be familiar with HIPAA to avoid violating its restrictions.<sup>8</sup>

### A. Authorizations

HIPAA's restrictions on the discovery of personal medical information are broadly applicable and are manifest to the public mainly through the prolific increase in required consent and authorization forms at the doctor's office. To begin, HIPAA states that except in a few instances—such as when consent alone is sufficient—“a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.”<sup>9</sup> Essentially, a “covered entity” must not disseminate a person's medical information without the person's written

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6. HIPAA, Pub. L. No. 104-191, 110 Stat. 1936.

7. See Robert B. Miller & Jeff Robertson, *HIPAA? Huh?: Discovering Medical Records in Oregon After HIPAA*, 64 OR. ST. B. BULL. 31, 31 (2004).

8. Elizabeth Robinson, *HIPAA for Litigators*, 8 HAW. B.J. 5, 5 (2004).

9. 45 C.F.R. § 164.508(a)(1) (2005). HIPAA expressly permits a covered entity to disclose health information without an authorization to other covered entities for purposes of “treatment, payment, or health care operations.” *Id.* § 164.506(a). In such instances, the health care provider is not required to obtain a full authorization with all of the elements listed in § 164.508. It may, however, obtain a simple signed consent form. See *id.* § 164.506(b)(1).

authorization, and the “covered entity” must adhere to the express terms of the authorization if any information is indeed disclosed.

One can easily see the impact of this requirement in the proliferation of paperwork that awaits anyone in need of medical care. But this authorization rule is not as simple as one might think. A number of ambiguities tend to create confusion about this and HIPAA's other requirements.<sup>10</sup> One such ambiguity lies in the application of the term “covered entity.”<sup>11</sup> HIPAA “states that ‘covered entities’ include health care providers, health plans (which include group plans), insurance companies, parts of Medicare, Medicaid, long-term care providers, and employee welfare benefit plans. The term also includes health care clearinghouses, which process health data and provide billing services.”<sup>12</sup> As will be discussed later, the breadth of the definition of a “covered entity” is problematic and should be limited in scope.<sup>13</sup>

A second point of confusion is what exactly constitutes a “valid” authorization. According to the text of HIPAA, a valid authorization must contain specific elements such as a description of the information to be used or disclosed, the name of the person authorized to make the requested use or disclosure, the name of the person to whom the covered entity may make the requested use or disclosure, a description of each purpose of the requested use or disclosure, an expiration date or event, and a dated signature.<sup>14</sup> In addition, a valid authorization must place an individual on notice of the right to revoke the authorization in writing, of the ability or inability of the covered entity to condition treatment upon signature of the authorization, and of the fact that information subject to the authorization may cease to be protected.<sup>15</sup> Finally, an authorization must be written in plain language, and if the authorization allows a covered entity to disclose protected health information, the individual who signed it must receive a copy.<sup>16</sup>

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10. Laura Parker, *Medical-Privacy Law Creates Wide Confusion*, USA TODAY, Oct. 17, 2003, at A1.

11. See David R. Morantz, Comment, *HIPAA's Headaches: A Call for a First Amendment Exception to the Newly Enacted Health Care Privacy Rules*, 53 U. KAN. L. REV. 479, 482 (2005).

12. *Id.* (citations omitted).

13. See *infra* Part IV.A.

14. 45 C.F.R. § 164.508(c)(1).

15. *Id.* § 164.508(c)(2).

16. *Id.* § 164.508(c)(3)–(4).

An authorization can become defective, and therefore null, in several ways. An authorization becomes defective if the expiration date has passed or the expiration event is known by the covered entity to have occurred, the authorization has not been filled out completely, the authorization is known by the covered entity to have been revoked, the authorization violates prohibitions against compound authorizations or conditioning of treatment on authorization, or if any material information in the authorization is known by the covered entity to be false.<sup>17</sup> The myriad requirements and possible disqualifiers tend to add confusion as to when an authorization is valid, what information is permitted to be disclosed, and to whom the information is available.

*B. Exceptions to the Authorization Requirement*

While the authorization requirement is the most pervasive and perhaps most significant to the average person, it is not always viable for a defense attorney to obtain a plaintiff's authorization in order to receive medical records or other protected health information when the records become at issue in a lawsuit. If an attorney wishes to conduct an ex parte interview with a plaintiff's treating physician (assuming the law of that jurisdiction permits such an interview), HIPAA does nothing to prohibit the plaintiff from simply refusing to sign the authorization. In a personal injury or products liability lawsuit, the medical treatment and condition of the plaintiff is one of the central issues, and thus the plaintiff's medical information is pertinent and necessary for proper defense. For this reason, HIPAA includes several exceptions to the authorization requirement that are of particular importance in litigation.

HIPAA provides that an authorization is not required in order for a covered entity to disclose protected health information in judicial or administrative proceedings and allows disclosure in response to an order of a court or administrative tribunal.<sup>18</sup> Health information can also be disclosed without an authorization

[i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court . . . , if:

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17. *Id.* § 164.508(b)(2).

18. *Id.* § 164.512(c)(1)(i)–(ii).

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(A) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order . . . .<sup>19</sup>

The simplest way to gain access to a plaintiff's medical records is by obtaining a court order,<sup>20</sup> but medical records can also be disclosed if the party seeking the information can provide "satisfactory assurance" to the covered entity that reasonable efforts have been made to inform the subject of the request that the information is being sought.<sup>21</sup> This can be accomplished by providing documentation proving that the party requesting the information has made a good-faith effort to provide written notice to individuals whose records are being requested.<sup>22</sup> As long as the notice includes sufficient information about the litigation for which the records are sought, and the party whose records are at issue has had sufficient time to object to the disclosure, the court can permit the records to be disclosed.<sup>23</sup>

A third method for obtaining the medical records without an authorization is to make a showing of "satisfactory assurance" that reasonable efforts have been made to obtain a protective order.<sup>24</sup> The documentation in that case should show that either (1) the parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court, or (2) the party seeking the protected health information has requested a qualified protective order from the court.<sup>25</sup> A "qualified protective order" is an order of the court or a stipulation by the parties to the litigation that both prohibits the parties from using or disclosing the protected health information for any purpose other than the

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19. *Id.* § 164.512(e)(1)(ii).

20. *See generally id.* § 164.512(e)(1)(i).

21. *Id.* § 164.512(e)(1)(iii).

22. *Id.*

23. *Id.*

24. *Id.* § 164.512(e)(1)(iv).

25. *Id.*



litigation or proceeding for which such information was requested, and requires the return or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.<sup>26</sup>

Finally, HIPAA does not prevent a covered entity from releasing protected information pursuant to a subpoena, discovery request, or other lawful process, even if the entity does not receive satisfactory assurances, as long as the party seeking the information has made reasonable efforts to provide satisfactory notice or obtain a qualified protective order.<sup>27</sup> Although releasing information in these situations is allowed, to avoid coming into conflict with HIPAA's regulatory scheme, discovery requests and court orders must be drafted to request only the minimum amount of information necessary.<sup>28</sup>

### *C. Ex Parte Interviews*

The specific provisions of HIPAA that govern discovery of protected personal health information are lengthy and confusing,<sup>29</sup> but they are by no means comprehensive. One issue not explicitly addressed in HIPAA's text is the legality of defense attorneys' practice of conducting ex parte interviews with plaintiffs' physicians. Despite the effect that HIPAA has had on informal discovery, nowhere among HIPAA's express purposes, or even in HIPAA's legislative history, is any reference made to ex parte interviews.<sup>30</sup> Rather, the impact on informal discovery tactics in litigation has come without an expressed Congressional intent to that end.<sup>31</sup> Not only is there a conspicuous absence of "any reference to or any balancing of the competing policy considerations regarding ex parte interviews,"<sup>32</sup> but the DHHS specifically stated that at least one of its HIPAA privacy regulations was "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without

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26. *Id.* § 164.512(e)(1)(v).

27. *Id.* § 164.512(e)(1)(vi).

28. *Id.* § 164.502(b).

29. See Parker, *supra* note 10, at A1 (pointing out that HIPAA's privacy regulations began as a 337-word guideline before swelling to 101,000 words).

30. See *Conning the IADC Newsletters*, 71 DEF. COUNS. J. 199, 209 (2004).

31. *Id.*

32. *Id.* at 211.

consenting to the production of his or her protected information.”<sup>33</sup> It is important to note that this statement says nothing about whether such information has to be provided informally or through formal judicial proceedings, and thus does nothing to clarify what effect HIPAA will have on informal proceedings such as ex parte interviews.

In addition, some of the cases addressing this issue not only involve applying HIPAA to ex parte conversations,<sup>34</sup> but also raise the question of whether ex parte communications are permitted even if HIPAA's basic requirements for discovery are met. The next Part will discuss these cases and how some courts have ruled on the legality of ex parte interviews.

### III. EX PARTE INTERVIEWS OF PHYSICIANS UNDER HIPAA

Prior to HIPAA, many states had already prohibited defense attorneys from conducting ex parte interviews with a plaintiff's treating physician.<sup>35</sup> In fact, practitioners disagreed about the appropriateness of permitting an opposing attorney to privately interview a client's treating physician and argued both sides of the issue in law reviews and journal articles.<sup>36</sup> In an article published in 1999, one author listed nineteen states that prohibited ex parte interviews with physicians and nineteen states plus the District of Columbia where such interviews were permitted.<sup>37</sup> By the time full compliance with HIPAA was required on April 14, 2003,<sup>38</sup> one tally

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33. 65 Fed. Reg. 82,530 (Dec. 28, 2000) (discussing 45 C.F.R. § 164.512).

34. HIPAA explicitly includes both oral and recorded information in its definition of “health information.” See 42 U.S.C. § 1320d(4) (2005).

35. See Christopher Smith, Comment, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact with Plaintiff's Treating Physician*, 23 J. LEGAL PROF. 247, 252–53 (1999).

36. See, e.g., Barbara Podlucky Berens, Note, *Defendants' Right To Conduct Ex Parte Interviews with Treating Physicians in Drug or Medical Device Cases*, 73 MINN. L. REV. 1451 (1989); Smith, *supra* note 35.

37. The states prohibiting ex parte interviews included Alabama, Arizona, Florida, Illinois, Indiana, Iowa, Minnesota, Mississippi, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Dakota, Texas, Washington, West Virginia, and Wyoming. See Smith, *supra* note 35, at 252–55.

The jurisdictions that permitted ex parte interviews included Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Georgia, Idaho, Kansas, Kentucky, Michigan, Missouri, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin. See *id.*

38. *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015, 1027–28 (S.D. Cal. 2004).

found that fifteen states and the District of Columbia expressly permitted conducting ex parte interviews with a plaintiff's health care provider while twenty-four states expressly prohibited the same practice.<sup>39</sup> Considering this disparity, it is not surprising that the issue of ex parte interviews under HIPAA came before the courts in only a matter of months. As noted above, HIPAA did not directly address the propriety of conducting ex parte interviews. Consequently, subsequent court decisions applying HIPAA were largely decided on state laws and on conflicting policy considerations. In the end, these decisions did little to unify the disparate treatment of ex parte communications with physicians.

*A. Court Determinations of HIPAA's Impact on Informal Discovery*

While the bulk of the following cases were decided in the federal courts, the first case of note was decided in a New Jersey state court in September 2003.<sup>40</sup> In *Smith v. American Home Products Corp.*, plaintiffs alleged personal injuries as the result of the use of phenylpropanolamine (PPA).<sup>41</sup> The defendant drug manufacturers filed a motion to compel ex parte interviews with the plaintiffs' physicians.<sup>42</sup> This was a case of first impression as to whether HIPAA preempted New Jersey case law that expressly permitted ex parte interviews with a plaintiff's health care provider.<sup>43</sup>

The key regulation in this case was 45 C.F.R. § 160.203, which provides that HIPAA preempts any contrary provisions of state law unless "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under [HIPAA]."<sup>44</sup> Accordingly, the New Jersey Superior Court analyzed New Jersey's state law and determined that HIPAA

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39. Connie A. Mateo & David C. Uitti, *HIPAA and State Discovery Practices*, 3 PHARMACEUTICAL & MED. DEVICE L. BULL., Sept. 16, 2003, at 1.

40. *Smith v. Am. Home Prods. Corp.*, 855 A.2d 608 (N.J. Super. Ct. Law Div. 2003).

41. *Id.* at 610.

42. *Id.*

43. *Id.*; see *Stempler v. Speidell*, 495 A.2d 857 (N.J. 1985) (creating informal discovery procedures for the state of New Jersey which include provisions allowing for the ex parte interview of a plaintiff's physician).

44. 45 C.F.R. § 160.203(b) (2005); see also *Law v. Zuckerman*, 307 F. Supp. 2d 705, 709–10 (D. Md. 2004).

does not preempt New Jersey's informal discovery techniques.<sup>45</sup> The court stated that a determination of whether a state law was more stringent and thus avoided preemption should be based on a determination of whether the state law

1) prohibits or restricts a use or disclosure more so than the Privacy Rule; 2) permits greater rights of access to or amendment of information; 3) provides the individual with a greater amount of information; 4) narrows the scope or duration of an authorization or consent, expands the criteria necessary for an authorization or consent, or reduces the coercive effect of the circumstances surrounding an authorization or consent; or 5) requires longer or more detailed retention or reporting of disclosures.<sup>46</sup>

The court relied on the fact that none of HIPAA's regulations explicitly address the issue of *ex parte* interviews with treating physicians<sup>47</sup> and made the determination that informal discovery in New Jersey would be governed by state law. In the court's words, "[n]owhere in HIPAA does the issue of *ex parte* [sic] interviews with treating physicians come into view; therefore, this court finds no express preemption regarding such interviews, leaving [them] a viable tool for defense counsel."<sup>48</sup> While those practicing law in New Jersey could thereafter feel comfortable adhering to state law and conducting *ex parte* interviews, the *Smith* decision left little guidance for those in other jurisdictions.

Unlike the New Jersey court in *Smith*, the Federal District Court for the District of Maryland concluded that HIPAA was more stringent than the relevant state law.<sup>49</sup> In one of the earliest federal cases on the subject, *Law v. Zuckerman*, the plaintiff, Rosalyn Law, sued physician David Zuckerman for medical malpractice.<sup>50</sup> During pre-trial discovery, the defendant's counsel conducted *ex parte* interviews with the plaintiff's current physician, Thomas Pinckert.<sup>51</sup> As a result of those interviews, the plaintiff filed a motion that raised two questions of first impression in the Fourth Circuit: (1) did

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45. *Smith*, 855 A.2d at 621.

46. *Id.* at 622.

47. *Id.*

48. *Id.* at 626.

49. *Zuckerman*, 307 F. Supp. 2d at 711.

50. *Id.* at 707.

51. *Id.*

defense counsel's ex parte communications with the plaintiff's physician violate HIPAA, and (2) if so, was preventing defense counsel from having any further contacts with Dr. Pinckert a proper remedy?<sup>52</sup>

The court first found that HIPAA was more stringent than the applicable Maryland law, and held that all ex parte communications must be "conducted in accordance with the procedures set forth in HIPAA."<sup>53</sup> The court ruled that while defense counsel's contact with the plaintiff's physician was technically a violation of HIPAA, defendant's attorneys had acted in good faith and the remedy requested by the plaintiff—preventing defense counsel from any further contact with Dr. Pinckert—was inappropriate.<sup>54</sup> Most importantly, however, the court determined that ex parte interviews with a plaintiff's physician are legitimate as long as defense counsel adheres to the procedures set forth by HIPAA.<sup>55</sup> Unlike *Smith*, where the decision to permit the ex parte interview had been based on state law, the court here found that HIPAA itself permitted ex parte interviews, as long as those interviews were conducted pursuant to HIPAA's restrictions.

Other courts disagreed. In the spring of 2004, the U.S. District Court for the Southern District of California decided whether defense counsel should be disqualified for improper ex parte communications with one of the plaintiff's treating physicians.<sup>56</sup> In the unusual circumstances of *Crenshaw v. Mony Life Insurance Co.*, the defense hired an expert witness, Dr. Harris, who had on one occasion treated the plaintiff.<sup>57</sup> If the plaintiff's one meeting with Dr. Harris was sufficient to make Dr. Harris a treating physician, HIPAA required that defense counsel give notice to the plaintiff before meeting with him.<sup>58</sup>

The court determined, based on both federal and state law, that Dr. Harris was not the plaintiff's treating physician, and therefore defense counsel had not committed any ethical violations.<sup>59</sup> The

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52. *Id.* at 706–07.

53. *Id.* at 711.

54. *Id.* at 712–13.

55. *Id.*

56. *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015, 1020–21 (S.D. Cal. 2004).

57. *Id.* at 1018.

58. *Id.* at 1027.

59. *Id.* at 1023–24.

court found, however, that even though the informal discovery techniques employed by defense counsel were not prohibited by California law, "HIPAA does not authorize ex parte contacts with healthcare providers."<sup>60</sup> The court's opinion was that "[o]nly formal discovery requests appear to satisfy the requirements of [HIPAA]."<sup>61</sup> While *Zuckerman* required that limited ex parte interviews be conducted in compliance with HIPAA, *Crenshaw* went further, finding that informal discovery was in direct violation of HIPAA's regulatory scheme.

Another federal court restricted the use of ex parte communications when the Equal Employment Opportunity Commission (EEOC) alleged that the Boston Market Corporation had engaged in disability discrimination.<sup>62</sup> During discovery, the defendant filed a motion seeking an order allowing ex parte communication with two psychologists who had evaluated one of the complaining witnesses.<sup>63</sup> The witness admitted that the defendant was authorized to obtain all of her medical records and to depose her doctors, but contended that HIPAA precluded ex parte discussions between the defendants and her doctors or psychologists.<sup>64</sup>

The court pointed out, as had the other federal courts before it, that HIPAA "does not expressly prohibit ex parte communications with health providers for an adverse party, but neither does it authorize such communications."<sup>65</sup> The court then discussed both the *Crenshaw*<sup>66</sup> and *Zuckerman*<sup>67</sup> decisions before concluding that "ex parte communications regarding the disclosure of health information, while not expressly prohibited by HIPAA, create, as the court in [*Zuckerman*] warned, too great a risk of running afoul of that statute's strong federal policy in favor of protecting the privacy of patient medical records."<sup>68</sup> The court advised that while "non-

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60. *Id.* at 1029.

61. *Id.*

62. EEOC v. Boston Mkt. Corp., No. CV 03-4227(LDW) (WDW), 2004 U.S. Dist. LEXIS 27338 (E.D.N.Y. Dec. 16, 2004).

63. *Id.* at \*1.

64. *Id.* at \*1-2.

65. *Id.* at \*16.

66. *Crenshaw*, 318 F. Supp. 2d at 1020.

67. *Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004).

68. *Boston Mkt.*, 2004 U.S. Dist. LEXIS 27338, at \*18.

health related information such as the time or place of depositions” can be discussed through ex parte communications, the “release of health information is to be made only through the use of methods listed in HIPAA.”<sup>69</sup> As a result of this determination, the court declined to permit ex parte release of the plaintiff’s personal health information, even with a protective order that would meet HIPAA’s requirements.<sup>70</sup> This decision was a confirmation of the California District Court’s decision that ex parte communications between defense counsel and plaintiff’s health providers are not permissible.

In the past year and a half, the federal courts have decided at least three more cases in which ex parte interviews with a plaintiff’s physician were at issue. In the first case, the court decided that ex parte interviews would be permitted if a qualified protective order was in place, but the two most recent decisions tended to follow the analysis of *EEOC* and have severely limited or completely done away with this form of informal discovery.

The first of these decisions was *Bayne v. Provost*, which was decided in January 2005 in the Northern District of New York.<sup>71</sup> The defendants had presented the plaintiff with a HIPAA authorization form in order to gain access to the defendant’s medical records.<sup>72</sup> Rather than signing the authorization provided by the defendants, however, the plaintiff provided a limited medical release that included the following statements: “This authorization is for written records ONLY. You are NOT authorized to discuss any matters relating to my medical condition, course of treatment or prognosis.”<sup>73</sup> The defendants objected to this limitation and asked the court to decide if the plaintiff had the right to refuse defendants’ request for an ex parte interview with plaintiff’s medical providers.<sup>74</sup>

In making its determination, the court had little to rely on, but took into account *Zuckerman* and *Crenshaw*.<sup>75</sup> The court concluded that an ex parte interview would be appropriate if a qualified protective order (one consistent with HIPAA) was in place.<sup>76</sup> While

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69. *Id.* at \*18–19.

70. *Id.* at \*20.

71. *Bayne v. Provost*, 359 F. Supp. 2d 234 (N.D.N.Y. 2005).

72. *Id.* at 235–36.

73. *Id.* at 236.

74. *Id.*

75. *Id.* at 240.

76. *Id.* at 241.

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the court stated that it was “not quite prepared to say that there are no built-in protections . . . which the Plaintiff, himself, can invoke to limit his medical records and minimize the exposure of *ex parte* [sic] interviews,”<sup>77</sup> the court, nevertheless, granted the defendants a qualified protective order and authorization to conduct an *ex parte* interview with one of the plaintiff’s medical providers.<sup>78</sup>

Shortly after the *Bayne* decision, the District Court for the Eastern District of Michigan interpreted HIPAA more strictly.<sup>79</sup> *Croskey v. BMW of North America, Inc.* involved the alleged explosion of a radiator in a 1992 BMW 325.<sup>80</sup> Plaintiff brought a products liability action against the car manufacturer, and the defendant filed a motion seeking the opportunity “to meet *ex parte* with all of plaintiff’s treating physicians and health care providers.”<sup>81</sup> The court first made the determination that HIPAA preempted Michigan law.<sup>82</sup> Then, following a review of existent case law on the subject, the court concluded that

HIPAA does not permit informal discovery. With regard to HIPAA, at least one court has stated that “informal discovery of protected health information is now prohibited unless the patient consents.” Another court has stated that “HIPAA does not authorize *ex parte* contacts with healthcare providers.” . . . I find these cases persuasive for the theory that *ex parte* meetings with defense counsel are not permitted by HIPAA.<sup>83</sup>

Relying on its determination of “HIPAA’s distaste for informal discovery,”<sup>84</sup> the court ruled that *ex parte* interviews of plaintiff’s physicians are available only when (1) the defendant has a HIPAA valid authorization, (2) plaintiff’s counsel has been notified of the desire to conduct the interview, and (3) the physician has been notified that such an interview is not required.<sup>85</sup> If both the plaintiff

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77. *Id.* at 241–42.

78. *Id.* at 243.

79. *See* *Croskey v. BMW of N. Am., Inc.*, No. 02-CV-73747-DT, 2005 U.S. Dist. LEXIS 3673 (E.D. Mich. Feb. 14, 2005).

80. *Id.* at \*2.

81. *Id.*

82. *Id.* at \*20.

83. *Id.* at \*15–16 (citing *Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md. 2004); *Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015, 1029 (S.D. Cal. 2004)).

84. *Id.* at \*29.

85. *Id.*



and the physician approve, the ex parte meeting can be conducted.<sup>86</sup> Essentially, the *Croskey* court placed complete control over the possibility of an ex parte interview in the hands of the plaintiff. The court stated that no matter which of HIPAA's provisions are used to obtain an interview (such as obtaining a court order or issuing a subpoena), the notice requirements must be fulfilled,<sup>87</sup> once again reiterating "HIPAA's distaste for informal discovery."<sup>88</sup>

The *Croskey* decision illustrates that the use of ex parte interviews during discovery continues to be limited. While the majority of the courts have determined that the informal and unauthorized use of such meetings was eliminated by HIPAA, some cases have gone so far as to prohibit, or severely limit, the arrangement of ex parte interviews pursuant to HIPAA's formal procedures. The *Croskey* court felt that HIPAA was so strongly against informal discovery that an ex parte interview could only be conducted with the permission of the court, the plaintiff, and the physician himself.<sup>89</sup> In light of these requirements, a formal deposition would appear to be the simplest method of discovery, and only in unusual circumstances would a defense attorney find it useful to pursue the possibility of an ex parte conversation with the plaintiff's physician.

In July 2005, another federal district court considered the legality of ex parte interviews.<sup>90</sup> In that case, a class action suit against the manufacturers of the drug Vioxx, the court had originally ordered that any party wishing to interview a plaintiff's physician had to serve opposing counsel with a notice of their intent to do so.<sup>91</sup> According to the court's order, "opposing counsel would then be permitted to attend and participate in the noticed interview, but if opposing counsel decided not to participate in the interview, the noticing party could conduct said interview without opposing counsel's presence."<sup>92</sup>

The plaintiffs challenged the order, arguing that its application should be limited to those physicians who had been named as

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86. *Id.*

87. *Id.* at \*33-34.

88. *Id.* at \*34.

89. *Id.*

90. *In re Vioxx Prods. Liab. Litig.*, 230 F.R.D. 473 (E.D. La. 2005).

91. *Id.* at 474.

92. *Id.*

defendants.<sup>93</sup> In the end, the court decided that the patient-physician relationship would best be protected by restricting the defendants from conducting ex parte interviews of the plaintiff's treating physicians, but allowing plaintiff's counsel to engage in ex parte interviews with any doctors that had not been named defendants.<sup>94</sup> The court reasoned that

[t]he Defendants still are entitled to all of the medical records of the Plaintiffs as well as the Plaintiff Profile Forms setting forth each Plaintiff's detailed medical history. The Defendants can also continue to exercise their right to depose the Plaintiffs' treating physicians or confer with them in the presence of Plaintiffs' counsel. Furthermore, as a practical matter, the Defendants already have information, including documentation, regarding what its representatives told the treating physicians about Vioxx. Therefore, the Defendants do not need the doctors to tell them in ex parte conferences what they already know.<sup>95</sup>

This argument provides support for the elimination of informal discovery of personally identifiable health information. But some argue that decisions such as this ignore the special considerations that make ex parte interviews so valuable to defense counsel.<sup>96</sup> While both sides of the debate have offered reasons for their positions, stronger reasoning supports the usefulness and value of such interviews.

#### *B. Policy Reasons Proffered for the Elimination of Informal Discovery*

The preceding decisions are not in complete agreement on all issues. Some of the courts permitted ex parte interviews only according to the terms of HIPAA.<sup>97</sup> One unreported opinion added additional requirements to HIPAA's express rules in order to protect a plaintiff's privacy rights.<sup>98</sup> Others prohibited ex parte interviews with a plaintiff's treating physician altogether.<sup>99</sup> But even the New

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93. *Id.*

94. *Id.* at 477.

95. *Id.*

96. *See* Berens, *supra* note 36.

97. *See, e.g.,* Bayne v. Provost, 359 F. Supp. 2d 234, 241 (N.D.N.Y. 2005); Law v. Zuckerman, 307 F. Supp. 2d 705, 711 (D. Md. 2004).

98. Croskey v. BMW of N. Am., Inc., No. 02-CV-73747-DT, 2005 U.S. Dist. LEXIS 3673, at \*34 (E.D. Mich. Feb. 14, 2005).

99. *See* Crenshaw v. Mony Life Ins. Co., 318 F. Supp. 2d 1015, 1029 (S.D. Cal. 2004);

Jersey state court holding HIPAA inapplicable did not freely permit ex parte interviews; rather, interviews in that court's jurisdiction are still subject to the restrictions imposed by the *Stempler* decision.<sup>100</sup> Thus, in the time following HIPAA's passage, no court in the United States has held that ex parte interviews with a plaintiff's treating physician are permitted absent some sort of formal restrictions. A defense attorney wishing to conduct an ex parte interview with a plaintiff's health provider must generally adhere to strict and complicated formal procedures, and in some situations the interview is either completely dependent on the plaintiff's willingness to allow it or prohibited altogether.

The debate regarding the extent to which informal discovery should be permitted continues in spite of the seeming consensus that informal discovery such as ex parte interviews are to be disfavored when it comes to physicians. "The simple fact that Congress and the DHHS did not address ex parte interviews in HIPAA and the regulations is compelling evidence that courts retain the discretion to permit these informal discovery devices on a jurisdiction-by-jurisdiction basis."<sup>101</sup> No set standard is in place to govern the availability of an ex parte interview, and the extent to which ex parte interviews are permitted in any particular instance will depend in large part on the jurisdiction's judicial analysis of HIPAA's interplay with state law. There is still a split among states as to whether ex parte communications with a plaintiff's treating physician should be permitted at all. What follows is a discussion of the policy considerations that are at the heart of the disagreement.

### *1. The physician-patient privilege*

Much of the support for HIPAA's protections, and for general privacy considerations in any medical context, is based on recognition of the confidential relationship between doctor and patient. While the physician-patient privilege did not exist under the common law, most states recognize it by statute.<sup>102</sup> The privilege

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EEOC v. Boston Mkt. Corp., No. CV 03-4227(LDW) (WDW), 2004 U.S. Dist. LEXIS 27338, at \*20-21 (E.D.N.Y. Dec. 16, 2004).

100. *Stempler v. Speidell*, 495 A.2d 857 (N.J. 1985); *Smith v. Am. Home Prods. Corp.*, 855 A.2d 608, 624 (N.J. Super. Ct. Law Div. 2003).

101. *Conning the LADC Newsletters*, *supra* note 30, at 214.

102. See *Smith*, *supra* note 35, at 247-48 (citing David L. Woodard, Note, *Shielding the Plaintiff and Physician: The Prohibition of Ex Parte Contacts with a Plaintiff's Treating*

provides support for the limitation or elimination of ex parte interviews and encompasses a number of policy justifications, such as encouraging patients to freely and candidly discuss medical concerns with their doctors, fulfilling the public's expectation that such communications will be held privately, and protecting physicians that lack legal training from inadvertent disclosures.<sup>103</sup> Thus, it is not surprising that prior to HIPAA's passage, almost half of the states already prohibited ex parte interviews of a plaintiff's treating physician.<sup>104</sup> One federal court, in defending its decision to disallow defense counsel's ex parte contacts with plaintiffs' physicians, went so far as to quote the classical version of the Hippocratic Oath: "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about."<sup>105</sup> The court explained that

[t]he ethical rules and attendant laws regarding the relationship between a physician and a patient serve both utilitarian and fairness purposes. Confidentiality reduces the stigma attached to seeking treatment for some infectious diseases and invites patients to provide information about previous ailments with greater candor. This effect allows physicians to provide more thorough preventative care. Moreover, because "almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, [] every patient has a right to rely upon this warranty of silence." Impairing the relationship between a physician and a patient would therefore not only be unfair to patients that have provided information to their physicians in confidence, but could reduce the quality of medical care provided.<sup>106</sup>

While the opposition to informal discovery techniques involving health care providers is supported by these considerations, neither HIPAA's text nor its legislative history contains a justification or explanation of its intentions with regard to ex parte interviews,<sup>107</sup> and

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*Physician*, 13 CAMPBELL L. REV. 233, 236 (1991)).

103. *Id.* at 251.

104. See Mateo & Utti, *supra* note 39, at 1.

105. *In re Vioxx Prods. Liab. Litig.*, 230 F.R.D. 473, 476 (E.D. La. 2005) (quoting LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION* (1943)).

106. *Id.* at 477 (internal citations omitted).

107. See *Conning the IADC Newsletters*, *supra* note 30, at 211.

we are left only to assume that basic medical privacy concerns were at the heart of the privacy rules promulgated by the DHHS. One problem with relying on the physician-patient privilege to support the prohibition of *ex parte* interviews is that in the context of products liability or personal injury litigation, the concerns that support the privilege are weakened or eliminated when a plaintiff files a lawsuit,<sup>108</sup> mainly because in so doing, a plaintiff has placed previously protected health information at issue, thereby subjecting the information to discovery. Nevertheless, the physician-patient privilege has proven to be enough of a consideration to warrant widespread restrictions on *ex parte* interviews with physicians.

## 2. *Arguments that informal discovery can harm physicians*

Another reason put forth for the elimination of informal discovery is the burden it places on physicians.<sup>109</sup> First, “[p]hysicians are placed in unenviable positions when defense attorneys engage them in *ex parte* [sic] communications, because they are confronted with numerous competing ethical, legal, and professional pressures in deciding whether and how to respond to such requests.”<sup>110</sup> Essentially, when a physician engages in an *ex parte* interview, the danger arises that the physician will reveal confidential information unrelated to the subject of the litigation and become liable for the disclosure.<sup>111</sup> Physicians are usually untrained in the law, and allowing a physician to shoulder the burden of possible wrongful disclosure is a gamble and is unfair to the doctor.<sup>112</sup> One author has suggested that if physicians were aware of the possible criminal, civil, and administrative penalties that could result from an improper physician disclosure, physicians “might object just as loudly as their patients to any attempts to engage them in *ex parte* [sic] communications.”<sup>113</sup>

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108. See Berens, *supra* note 36, at 1481.

109. See David G. Wirtes, Jr., R. Edwin Lamberth & Joanna Gomez, *An Important Consequence of HIPAA: No More Ex Parte Communications Between Defense Attorneys and Plaintiff's Treating Physicians*, 27 AM. J. TRIAL ADVOC. 1, 10 (2003).

110. *Id.*

111. Russ, *supra* note 2, at 29.

112. *Id.* at 29–30 (quoting *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986)).

113. Wirtes et al., *supra* note 109, at 14.

Some counter that such arguments fail to take into consideration that ex parte conversations with defense attorneys are not mandatory for the physician, who always has the opportunity for his own attorney to be present if he desires. “[A]llowing ex parte communications does not mandate that physicians must talk to defense counsel. The treating physician would still be able to decide what he or she wants to discuss.”<sup>114</sup> Educating doctors on the possible legal ramifications of an ex parte interview, and then allowing the doctor to decide whether or not to provide the interview, would seem to serve the same purpose as prohibiting the interview altogether. Having the doctor’s own attorney present would also provide the physician with the necessary legal protection. It seems that many legislatures, however, have found it easier to simply prohibit or restrict ex parte interviews, rather than hope that individual doctors know enough to protect themselves from liability stemming from an inadvertent disclosure of a patient’s private health information.

Concerns also arise over possible ethical misconduct when an attorney representing a medical malpractice insurer is allowed to conduct an interview of a plaintiff’s physician insured by that same company.<sup>115</sup> One state’s Board of Medical Examiners takes the position that “it is unethical and unprofessional for a physician to allow financial incentives or contractual ties of any kind to adversely affect his or her medical judgment of practice care.”<sup>116</sup> When physicians are placed in these situations, ethical questions are almost certain to arise.

### 3. *The argument that informal discovery harms the civil justice system*

In modern times the rules of discovery and civil procedure are intended in large part to prevent “Perry Mason” moments of surprise and “trial by ambush.”<sup>117</sup> Formal discovery methods such as depositions, interrogatories, and ex parte interviews conducted

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114. Smith, *supra* note 35, at 252 (citing John Jennings, *The Physician-Patient Relationship: The Permissibility of Ex Parte Communications Between Plaintiff’s Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441, 459 (1994)).

115. Russ, *supra* note 2, at 30–31 (citing *Manion v. N.P.W. Med. Ctr.*, 676 F. Supp. 585, 594–95 (M.D. Pa. 1987)).

116. Wirtes et al., *supra* note 109, at 13 (quoting ALA. ADMIN. CODE r. 540-X-9-.07 (2005)).

117. *Id.* at 14.

pursuant to regulations allow all parties to an action to keep abreast of the relevant issues.<sup>118</sup> In addition, following formal discovery channels allows the court to keep an eye on (and, when necessary, assert control over) the discovery proceedings.<sup>119</sup>

Others counter that when a defense attorney meets privately with a plaintiff's physician, the interview is intended to provide the defense with information to which the plaintiff's attorney has already had complete access.

Arguably, plaintiffs' attorneys who have filed lawsuits placing clients' medical conditions in issue have greater access to medical information than defense attorneys because plaintiffs' counsel can easily obtain medical authorizations from their clients. Further, a plaintiff's attorney may communicate freely with her client regarding the plaintiff's medical care and treatment and may even contact the plaintiff's treating physician to discuss care before filing the lawsuit.<sup>120</sup>

Ex parte interviews would not revive "Perry Mason moments," but rather would place defense and plaintiff's counsel on the same footing. In essence,

a rule disallowing ex parte communications with a plaintiff's treating physicians attempts to ensure the confidentiality of the physician-patient relationship at the expense of the defendant. Allowing a plaintiff to have free access to potentially important facts and/or expert witnesses while requiring the defendant to use more expensive, inconvenient, and burdensome formal discovery methods tilts the litigation playing field in favor of the plaintiff.<sup>121</sup>

The argument is that rather than creating any kind of disparity, permitting ex parte interviews with a plaintiff's treating physician allows equal access to relevant medical information.

#### *4. Claimed benefits of informal discovery*

Still others assert that, in spite of these arguments, the value of the ex parte interviews outweighs any concerns.<sup>122</sup> Some defense

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118. *See id.*

119. *Id.* at 15.

120. Melissa A. Couch, *Litigating Medical Malpractice Cases in Oklahoma: The Aftermath of HIPAA*, 57 OKLA. L. REV. 827, 827-28 (2004).

121. Jennings, *supra* note 114, at 475.

122. Berens, *supra* note 36, at 1481.

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attorneys complain that the elimination of informal discovery prevents them from “doing their jobs”<sup>123</sup> and contend that informal discovery methods are essential to their work.<sup>124</sup> In support of this claim they argue both (1) that informal discovery is more cost effective, and (2) that there is no substitute for the information obtained through an *ex parte* interview.<sup>125</sup> One court echoed those sentiments, stating that

there are entirely respectable reasons for conducting discovery by interview *vice* deposition: it is less costly and less likely to entail logistical or scheduling problems; it is conducive to spontaneity and candor in a way depositions can never be; and it is a cost-efficient means of eliminating non-essential witnesses.<sup>126</sup>

Other courts have been critical of these arguments. Regarding cost effectiveness, the Supreme Court of Missouri stated,

It is not clear that *ex parte* [sic] discussion ultimately results in the conservation of resources. The defendant must expend time and effort to prepare the authorization and move for the court order compelling execution. The defendant will spend further time and effort to secure and review the plaintiff's medical records so that the defendant has an intelligent basis upon which to have an *ex parte* [sic] discussion with the physician.<sup>127</sup>

In response to the informational argument, one Illinois court stated simply that “it is undisputed that *ex parte* [sic] conferences yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through the regular methods of discovery.”<sup>128</sup> The information available through informal means is still available to the defense attorney; HIPAA just requires that defense attorneys follow formal procedures in order to obtain it. But even if the information available turns out to be the same, the defense attorney would likely prefer informal discovery since the information could be obtained earlier and more easily.

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123. See Russ, *supra* note 2, at 29.

124. See *id.*

125. See *id.* at 31.

126. Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983).

127. State *ex rel.* Woytus v. Ryan, 776 S.W.2d 389, 394 (Mo. 1989).

128. Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 956 (Ill. App. Ct. 1986).



The idea that the policy reasons for protecting the physician-patient privilege outweigh any advantages that arise from the use of informal discovery methods has not been conclusively accepted, but the court decisions reviewed earlier all seem to support formal restrictions or elimination of the ex parte interviews of health care providers.<sup>129</sup> As a result, any defense attorney desiring the opportunity to conduct an ex parte interview with a plaintiff's physician must be prepared to satisfy the strict requirements of HIPAA's regulatory scheme, and should be prepared for a denial by either the plaintiff or the plaintiff's physician. "The breadth of HIPAA and the substantial repercussions for HIPAA violations undoubtedly will cause healthcare providers to think twice before agreeing to ex parte interviews," even if defense counsel has a strong argument that HIPAA should not apply.<sup>130</sup>

#### IV. APPLYING HIPAA TO EMERGENCY RESPONDERS

Recent decisions have clarified the requirements for interviewing a plaintiff's treating physician, at least in a few jurisdictions. At the very least, HIPAA's requirements should be met prior to any ex parte communication with the plaintiff's treating physician. There are questions regarding HIPAA's application, however, which have yet to be addressed in any degree by the courts. One of these questions is whether the procedural requirements for conducting an ex parte interview of a physician are applicable to emergency response personnel such as firefighters, EMTs, and paramedics. Often, in certain types of litigation such as personal injury or products liability cases, there is an incident or accident that serves as the trigger and basis for the plaintiff's claim. In many such cases, a first responder is called to the scene and gains personal knowledge of the facts and circumstances surrounding the incident. Some firms specializing in these areas of defense employ investigators to conduct informal interviews with first responders in order to learn the facts at the early stages of litigation. However, with HIPAA now in place, and with the continued use of HIPAA as a bullying tool to chill contact between defense attorneys and plaintiffs' physicians,<sup>131</sup> the question

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129. *See infra* Part III.A.

130. *Conning the IADC Newsletters*, *supra* note 30, at 214.

131. *Id.* at 215.

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has arisen as to whether these informal interviews are also subject to HIPAA's restrictions.

*A. Applying HIPAA to Emergency Response Personnel*

While the courts have not yet had the opportunity to decide whether to apply HIPAA's restrictions to EMTs and paramedics, the issue would likely turn in large part on the statutory definitions found in HIPAA's text. In examining HIPAA's definitions of "covered entities," emergency response personnel are unlikely to be considered "covered entities" in any context except that of a "health care provider."<sup>132</sup> HIPAA defines a health care provider as a provider of services under 42 U.S.C. § 1395x(u), a provider of medical or health services under 42 U.S.C. § 1395x(s), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.<sup>133</sup> Among the health services listed under § 1395x(s) are ambulance services, "where the use of other methods of transportation is contraindicated by the individual's condition."<sup>134</sup> This undoubtedly includes emergency situations in which paramedics or EMTs accompany patients to the hospital in an ambulance.

In addition, 45 C.F.R. § 160.103 defines health care as "care, services, or supplies related to the health of an individual."<sup>135</sup> The statute continues: "Health care includes, but is not limited to, the following: Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body . . . ."<sup>136</sup> Since emergency response personnel perform procedures with respect to the physical, mental, or functional status of the body, along with diagnosis and assessment, they could be technically termed "health care provider[s]" by the terms of the statute. Were the issue to be brought before the courts, a literal interpretation of HIPAA's provisions would subject

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132. Under HIPAA's definitions, emergency response personnel are not a "health plan" or a "health care clearinghouse." 45 C.F.R. § 160.103 (2005).

133. 42 U.S.C. § 1320d(4) (2005).

134. *Id.* § 1395x(s)(7).

135. 45 C.F.R. § 160.103.

136. *Id.*

emergency response personnel to the same discovery limitations that apply to physicians.

Many states have considered whether emergency medical personnel are health care providers for the purposes of various state statutes. In almost all such cases, EMTs and paramedics have been included as health care providers.<sup>137</sup> At least one state, however, excludes paramedics and EMTs from the category of “health care practitioner.” In *Watson v. Wal-Mart Stores, Inc.*,<sup>138</sup> the plaintiff prevailed at trial, but after the verdict was entered, the parties bickered over the amount of attorneys fees.<sup>139</sup> One of the plaintiff’s contentions was that the defense had violated a Florida statute prohibiting the disclosure of information given by a patient to a “health care practitioner” unless other requirements were previously met, such as the issuance of a subpoena.<sup>140</sup> The plaintiff contended that defense counsel had violated Florida law by conferring ex parte with the paramedic who had responded to the emergency call when the plaintiff fell.<sup>141</sup> Under section 456.001(6) of the Florida Statutes, a “health care practitioner” is a person licensed under certain chapters of the Florida Statutes.<sup>142</sup> The chapter under which paramedics were licensed was absent from the list. On this basis, the Federal District Court for the Northern District of Florida noted in an unpublished opinion that “[i]t thus was not unlawful, and it also was not unreasonable, for defendant’s attorneys to interview the paramedic, a witness to events at issue.”<sup>143</sup>

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137. See, e.g., *Bodelson v. City of Littleton*, 36 P.3d 214, 215 (Colo. Ct. App. 2001) (concluding that paramedics are “health care providers” under Colorado statutes); *Mooney v. Sneed*, No. 02A01-9709-CV-00210, 1999 WL 174133, at \*5 (Tenn. Ct. App. Mar. 31, 1999), *aff’d*, 30 S.W.3d 304 (Tenn. 2000) (holding that EMTs are “health care practitioners” under Tennessee statute); *Gross v. Innes*, 930 S.W.2d 237, 239 (Tex. App. 1996) (holding that paramedics are “medical personnel” for purposes of governmental immunity statute); *Carter v. Milford Valley Mem’l Hosp.*, 996 P.2d 1076, 1079 (Utah Ct. App. 2000) (holding that paramedics are “health care providers” under Utah’s Malpractice Act); *Marthaller v. King County Hosp.*, 973 P.2d 1098, 1102 (Wash. Ct. App. 1999) (“[A] paramedic is a health care practitioner . . . .”); *Linville v. City of Janesville*, 497 N.W.2d 465, 472 (Wis. Ct. App. 1993), *aff’d*, 516 N.W.2d 427 (Wis. 1994) (holding that paramedics are medical personnel for purposes of Wisconsin’s governmental immunity statute).

138. No. 4:03CV402RH/WCS, 2005 WL 1266686 (N.D. Fla. May 25, 2005).

139. *Id.* at \*1.

140. *Id.* at \*2; see FLA. STAT. § 456.057(6) (2005).

141. *Watson*, 2005 WL 1266686, at \*2.

142. FLA. STAT. § 456.001(6).

143. *Watson*, 2005 WL 1266686, at \*2.

It is important to note that this decision was made after HIPAA came into full effect. It appears, then, that there are at least some grounds for the ex parte interviewing of paramedics and EMTs. However, the *Watson* opinion makes no mention of HIPAA.<sup>144</sup> In addition, while the Florida statute is similar to HIPAA, HIPAA's regulatory scheme does not rely on a list of licensing statutes for inclusion as a "health care provider," but rather on its own included definitions. Therefore, while *Watson* provides a possible argument that emergency response personnel are not "health care providers," especially under Florida law, the statutory text indicates that they will be treated as such.<sup>145</sup>

*B. Emergency Response Personnel Should Not Be Subject  
to HIPAA's Regulatory Scheme*

Despite the fact that under HIPAA's language paramedics and EMTs are subject to the same discovery limitations as physicians, emergency response personnel should be excluded from some of HIPAA's regulations, including the prohibition against ex parte interviews.<sup>146</sup> For instance, if the legislative history had no indication of its applicability to ex parte interviews with physicians,<sup>147</sup> a debated practice among the various jurisdictions, it seems even less likely that Congress intended to eliminate ex parte interviews in a context in which they had been almost universally accepted. Another simple reason for treating emergency response personnel differently is the

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144. *Id.*

145. See 42 U.S.C. § 1320d(4) (2005).

146. While this Comment focuses on ex parte interviews, the application of HIPAA to emergency responders has been shown to be problematic in other contexts, as shown by the following anecdote:

On June 9, 2003, two months after the new Health Insurance Portability and Accountability Act (HIPAA) took effect, a Colorado man lay dying of a heart attack in his rural backyard. Neighbors trying to aid the man watched helplessly as an ambulance passed his house, according to a newspaper report. The ambulance crisscrossed the area, with paramedics stopping to ask how to find the man's address. Following western Colorado custom, neighbors didn't know how to give directions based on an address. Give us a name, they said, and we'll tell you where to go. But under their interpretation of the new HIPAA privacy regulations, the paramedics refused to release any information that would identify the man. The man died in his yard, although officials do not know if paramedics could have saved him had they found him earlier.

Morantz, *supra* note 11, at 479 (as reported in Parker, *supra* note 10, at A1).

147. *Conning the IADC Newsletters*, *supra* note 30, at 211.

difference between the nature of an EMT's or a paramedic's responsibilities and those of a personal physician. Despite the fact that emergency responders can be lumped into a nebulous definition of "health care providers"—most likely unintentionally—it seems obvious that EMTs and paramedics do not fill the same role as a physician. The policy reasons behind HIPAA's restrictions on informal discovery are weaker when applied to emergency response personnel.

*1. EMTs and paramedics generally do not maintain physician-patient relationships*

Perhaps the strongest argument made in support of HIPAA's prohibition of informal discovery is that such a rule protects the physician-patient relationship; but in an emergency responder context, there is no legally protected relationship.<sup>148</sup> HIPAA protects personally identifiable health information and strengthens the physician-patient relationship by insulating doctors from situations in which an improper disclosure may occur.<sup>149</sup> But as previously pointed out, there is no common law basis for the physician-patient privilege,<sup>150</sup> much less for an EMT-patient privilege. And until a legislature determines to create a firefighter-patient or paramedic-patient privilege, it does not exist. For that reason, policies created to protect the physician-patient privilege are wrongly applied in the emergency responder context.

And there are other reasons for limiting restrictions on ex parte interviews to a person's physicians. For instance, patients are much less likely to have the opportunity to choose their emergency response personnel as they are to pick a physician. Contact with an EMT or paramedic is more likely to be the result of a random assignment or of the proximity or availability of the responder relative to other responders. And even if a patient was given a choice in an emergency, the very fact that it is an emergency makes it highly unlikely that the patient would have or express a preference.

In addition, patients do not seek out paramedics in order to disclose an ailment or seek consultation. Emergency medical personnel are sent out based on availability in order to deal with

148. See *In re Vioxx Prods. Liab. Litig.*, 230 F.R.D. 473, 476–77 (E.D. La. 2005).

149. See Wirtes et al., *supra* note 109, at 10–14.

150. Smith, *supra* note 35, at 247.

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injuries or emergency situations that have just arisen. Therefore, there is virtually no need for a patient to develop a confidential relationship with an emergency responder. By nature, a paramedic-patient relationship is less confidential than a physician-patient relationship. Of course, an emergency responder might ask about allergies, illnesses, current medication, or consumption of alcohol or drugs. The answers to such questions might be information the patient would like to keep secret. Yet negative answers to those questions would likely not be embarrassing, and in most instances, positive answers would be made at issue the moment the patient decided to file a lawsuit based on that incident. Therefore, the chilling effect on patient disclosure that would occur if physicians did not maintain confidentiality is not as great of a concern in an emergency context.

*2. EMTs and paramedics are less likely to be harmed by informal discovery*

While physicians suffer from liability and confidentiality concerns in the context of ex parte interviews,<sup>151</sup> emergency response personnel are less likely to face these concerns. Currently, an EMT or paramedic has neither the pressures of a confidential relationship nor the potential for improper disclosure that a physician faces. Of course, applying HIPAA regulations to them would change that fact, but even so, HIPAA's application would not be enough to create a statutory privilege. And while a physician in an ex parte interview runs the risk of inadvertently disclosing information that is unrelated to the lawsuit, an EMT or paramedic in the same interview is less likely to reveal unrelated information for the simple reason that they possess little of such information. There could be instances in which the paramedic has repeatedly responded to emergencies involving the same individual, in which case they might possess information irrelevant to the present lawsuit, but those cases would be rare. Because emergency responders have less information to keep private in an interview, it is likely that they would have an easier time keeping it private. And most importantly, even if a paramedic did share private information, he or she would not be subject to liability on the basis of the violation of a statutory privilege, because there is no privilege in place.

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151. See Wirtes et al., *supra* note 109, at 10.

*3. Arguments about information loss have a real basis in an emergency context*

In addition, some arguments that have proven ineffective with respect to allowing ex parte interviews of physicians make more sense when applied to the question of interviews with paramedics and EMTs. Defense attorneys have argued that there is more information available through an ex parte interview than through formal discovery procedures.<sup>152</sup> Some courts have rejected these arguments in the context of physician interviews,<sup>153</sup> but there are some key considerations that make the argument more reasonable in the case of emergency medical personnel.

For example, a physician typically keeps detailed medical records for each of his or her patients, and when litigation arises this is often the information a defense attorney is seeking. The information an emergency responder possesses is usually the result of responding to an accident scene or other event, and thus will almost always include more than health information. In fact, a paramedic or EMT will commonly be sought out by defense counsel less for the plaintiff's health information, and more for their observations of an accident scene or the chronology of events. Firefighters and paramedics tend to be among the first to arrive at an accident scene, and thus can become essential fact witnesses. The very nature of the job places an emergency response person in a position to testify about more than just the medical condition of an individual.

Because an emergency responder does not usually have a recurring relationship with a patient, the paramedic's or EMT's recollection of a particular person is almost sure to fade quickly. In addition, while there may be some record kept of any health-related procedures, an EMT or paramedic may only record the bare minimum, while other observations regarding the accident scene or the patient's condition will be lost through the normal fading of memory.<sup>154</sup> When a defense attorney's main purpose is to discover any material facts that a paramedic may have observed, HIPAA's application would foil this purpose by delaying discovery until after relevant details may have faded from memory. And while there is no direct indication of HIPAA's purpose to this end, HIPAA bases the

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152. Russ, *supra* note 2, at 29–31.

153. Petrillo v. Syntex Labs., Inc., 499 N.E.2d 952, 956 (Ill. App. Ct. 1986).

154. See *supra* note 4.

delay solely on the concern that the paramedic may possess health-related information (or even more unfortunately, because the emergency responder's job description falls within HIPAA's statutory definition).

Were HIPAA applied as strictly to EMTs or paramedics as it is to plaintiffs' physicians, defense attorneys would find that useful information would be lost to them in almost every instance. Despite one court's statement that "ex parte conferences yield no greater evidence" than formal discovery,<sup>155</sup> there is an obvious difference between the amount of information that can be retrieved from an EMT or paramedic shortly after an incident and the amount retrievable in a deposition that takes place two or three years later. Yet under HIPAA's definitions, there is no distinction made between one type of "health care provider" and another,<sup>156</sup> leaving EMTs and paramedics subject to the same discovery restrictions as a personal physician. The slight possibility that some health information (information most likely related to the litigation) may be released, or the fact that emergency response personnel are technically "health care providers" under HIPAA's definitions,<sup>157</sup> are not compelling reasons for denying a defense attorney the opportunity to retrieve this essential information.

## V. CONCLUSION

HIPAA's privacy regulations were created in order to allow patients to exert greater control over their private health information. The majority of the courts have interpreted these provisions, however, as also removing informal discovery procedures from the arsenal of the litigator. A defense attorney may no longer conduct an ex parte interview of a plaintiff's physician unless, at the minimum, HIPAA's strict procedures for formal discovery are adhered to. While some attorneys have complained that HIPAA has thus handicapped their ability to perform defense work, there are some compelling reasons for HIPAA's statutory scheme, and in all likelihood it will continue. Protection of the physician-patient relationship and the integrity of the civil justice system are concerns

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155. Russ, *supra* note 2, at 31 (citing *Petrillo v. Syntex Labs., Inc.*, 499 N.E.2d 952, 956 (Ill. App. Ct. 1986)).

156. 45 C.F.R. § 160.103 (2005).

157. *Id.*



that lie at the heart of HIPAA's apparent aversion to informal discovery.

On the other hand, the role of emergency response personnel such as EMTs and paramedics differs in many ways from that of physicians, and although emergency responders are included in HIPAA's definition of a "health care provider," such personnel should be permitted greater freedom than that allowed by HIPAA's current regulatory scheme. Some of the interests that support restricting the ability to conduct ex parte interviews with a plaintiff's physician may still exist in the context of emergency response personnel, but those that remain are significantly weaker. At the same time, the arguments offered in support of ex parte interviews—largely ineffectual when applied in the physician context—are stronger when made in the emergency responder context. Allowing defense attorneys the opportunity to conduct ex parte interviews with EMTs and paramedics would be of great benefit to a defendant without damaging the relationships and privileges that HIPAA is designed to protect.

In order to prevent or mitigate HIPAA's chilling effect on ex parte interviews of emergency response personnel, in order to provide defense counsel with the tools and information necessary to best serve their clients, and in light of the complete lack of indicia in the legislative history of any intent to limit contact with EMTs and paramedics, HIPAA's restrictions on informal discovery should not be applied to emergency responders.

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